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July 31, 2015

VIA ECF

Hon. Vernon S. Broderick, U.S.D.J.
Thurgood Marshall United States Courthouse
40 Foley Square, Room 415
New York, NY 10007

Re: *In re: Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, MDL No. 2542; Response to Notice of Supplemental Authority filed by JBR, Inc.

Dear Judge Broderick:

We write in response to the Notice of Supplemental Authority filed yesterday by Plaintiff JBR, ECF No. 298. The authority that JBR cites has no relevance to this litigation.

Employees' Retirement System of Gov't of the Virgin Islands, et al. v. Lawrence J. Blanford, et al., No. 14-199-CV, 2015 WL 4491319 (2d Cir. July 24, 2015), is a securities action naming one of Keurig's predecessor companies as a defendant. JBR acknowledges that the case "addresse[s] the standard for pleading securities fraud." ECF No. 298 at 2.

JBR nonetheless argues that the securities case is relevant for two reasons. *First*, JBR claims that "just as Keurig argued here that it can prove that many of its statements subject to Rogers' Lanham Act claims are actually true . . . Keurig argued in *Blanford* that it could [explain a certain revenue gap]." *Id.* This assertion mischaracterizes Keurig's argument. Keurig argued in its motion to dismiss before this Court that plaintiffs' false advertising claims must be dismissed where, among other flaws, *plaintiffs' own allegations* demonstrated that the challenged statements were true. *See, e.g.,* Mot. to Dismiss Br., ECF No. 227 at 25 (citing *Nat'l Lighting Co., Inc. v. Bridge Metal Indus., LLC*, 601 F.Supp.2d 556, 564-65 (S.D.N.Y. 2009)); Mot. to Dismiss Oral Arg. Tr. at 63 ("[I]f you look at their complaint, for example, Treehouse,

paragraph 418, they say the ink merely triggers the default setting for either a K-cup or a Vue cup. It reads the ink and it triggers the default setting. This is a true statement."); *cf*. *id*. at 79-80 (discussing challenged statements regarding compatibility and the Keurig brewer warranty that plaintiffs affirmatively conceded were true). It is entirely appropriate for the Court to dismiss false advertising claims premised on statements that plaintiffs have conceded to be true, and *Blanford* says nothing to the contrary.

Second, JBR cites *Blanford* in an attempt to bolster its incorrect assertion that it can somehow state a monopolization claim even if its individual claims each fail. This, too, is incorrect. *Blanford*'s discussion of the scienter requirement of a securities claim does not change the fact that, under the antitrust laws, if individual actions are "not individually anti-competitive . . . they are not cumulatively anti-competitive, either." *See Eatoni Ergonomics, Inc. v. Research In Motion Corp*., 486 Fed. App'x 186 (2d Cir. 2012).

In sum, the decision that JBR identifies for this Court is neither pertinent nor significant to the pending motions. *See* Fed. R. App. P. 28(j) (supplemental authority must be "pertinent and significant" to matter under review); *see also Ormond v. Anthem, Inc.*, 2008 WL 906157, at *1 n.2 (S.D. Ind. Mar. 31, 2008) (stating that notices of supplemental authority in a district court case should comply with Fed. R. App. P. 28(j)).

Respectfully submitted,

/s/ Leah Brannon

Leah Brannon

cc: Counsel of record (via ECF)